Gu Kien Lee v Ketua Polis Daerah Kota Kinabalu Polis Diraja Malaysia

HIGH COURT (KOTA KINABALU) — APPLICATION FOR JUDICIAL REVIEW NO KK-25–26 OF 2011
ABDUL RAHMAN SEBLI J
16 NOVEMBER 2011

Criminal Procedure — Police investigation — Court direction to police to conduct further investigation — Mandamus application against respondents to recover and return applicant's boat seized by another — Applicant's police reports about seizure of boat not investigated — Applicant's complaints dismissed as civil dispute unworthy of investigation — Whether possible offence of criminal misappropriation of property disclosed — Whether fact that applicant could file civil suit for recovery of boat disentitled her from applying for mandamus — Specific Relief Act 1950 s 44(1)(d)

The applicant sought an order of mandamus from the High Court to direct the respondents to recover and return to her, her imported RM300,000 yacht which was being detained by one David Teo. In her affidavit in support of the application, the applicant said she had not received any news from the police despite lodging two police reports about the matter. In opposing the application, the respondents relied on an affidavit filed by a police officer, SM Sukumaran, who claimed the dispute between the applicant and David Teo was a private or contractual matter based on what was told to him both by David Teo and an employee of the court. SM Sukumaran said he had offered to help the applicant resolve her dispute with David Teo amicably. The respondents also argued that because the applicant could file a civil suit against David Teo for return of the boat, she could not seek mandamus against the respondents as she had failed to fulfil the condition in proviso (d) of s 44(1) of the Specific Relief Act 1950 ('Act') which required her to show she had no other specific or adequate legal remedy for her grievance.

Held, disallowing the relief sought by the applicant:

(1) Although this was not a fit and proper case for the court to order the respondents to seize and return the boat to the applicant, justice demanded, and ss 110(1) and 120(1) of the Criminal Procedure Code required, that her two police reports be fully and properly investigated without unnecessary delay and the result thereof be reported to the public prosecutor for his further action (see paras 19, 3 & 14).

(2) Where the detention of property involved a criminal element, the fact

that the victim could pursue a civil suit to recover the property did not disentitle him to the remedy under s 44(1) of the Act. It was the duty of the police to act where a crime had been committed, regardless of whether or not a civil remedy was available to the victim (see para 5).

(3) Two police reports had been lodged by the applicant yet SM Sukumaran saw it fit to try to resolve the matter 'amicably', a clear indication that no investigation was intended to be carried out. On the face of the two reports, taken together with the applicant's affidavit in support, a possible offence of criminal misappropriation of property was disclosed. SM Sukumaran was not competent to decide if the reports disclosed a civil or a criminal offence (see paras 9–10).

(4) The applicant's complaints did not deserve to be summarily dismissed as a mere civil dispute unworthy of investigation. Only a full and proper investigation could confirm if the detention of the applicant's boat involved any criminal element or otherwise (see para 12).

[Bahasa Malaysia summary

Pemohon memohon perintah mandamus daripada Mahkamah Tinggi untuk mengarahkan responden-responden untuk mendapatkan balik dan memulangkan kepadanya, kapal importnya yang bernilai RM300,000 yang ditahan oleh seorang yang bernama David Teo. Dalam afidavit menyokong permohonan tersebut, pemohon menyatakan dia tidak menerima apa-apa berita daripada polis walaupun telah membuat dua laporan polis mengenai perkara tersebut. Dalam membantah permohonan tersebut, responden-responden bergantung ke atas afidavit yang difailkan oleh seorang pegawai polis yang bernama SM Sukumaran, yang mendakwa bahawa pertikaian antara pemohon dan David Teo adalah perkara peribadi atau kontrak atas apa yang diberitahu kepadanya oleh kedua-dua David Teo dan pekerja mahkamah. SM Sukumaran menyatakan dia menawarkan untuk membantu pemohon menyelesaikan pertikaiannya dengan David Teo secara persahabatan. Responden-responden juga berhujah bahawa oleh kerana pemohon boleh memfailkan tindakan sivil terhadap David Teo untuk pemulangan balik kapal tersebut, dia tidak boleh memohon mandamus terhadap responden-responden memandangkan dia gagal untuk memenuhi syarat-syarat dalam proviso (d) s 44(1) Akta Relief Spesifik 1950 yang mengkehendakki dia untuk menunjukkan yang dia tidak mempunyai apa-apa remedi undang-undang spesifik atau wajar yang lain untuk rasa tidak puas hatinya.

Diputuskan, tidak membenarkan relief yang dipohon oleh pemohon:

(1) Walaupun kes ini bukan kes wajar untuk mahkamah mengarahkan responden-responden merampas dan memulangkan balik kapal kepada pemohon, keadilan diperlukan, dan ss 110(1) dan 120(1) Kanun

Prosedur Jenayah menghendakinya, bahawa kedua-dua laporan polis disiasat secara penuh dan betul tanpa kelewatan yang keterlaluan dan keputusannya dilaporkan kepada pendakwa raya untuk tindakan lanjutnya (lihat perenggan 19, 3 & 14).

(2) Di mana penahanan harta melibatkan unsur jenayah, fakta bahawa mangsa boleh meneruskan tindakan sivil untuk mendapatkan balik harta tidak membuatkan dia tidak berhak kepada remedi di bawah s 44(1) Akta. Ia adalah tugas polis untuk bertindak di mana perbuatan jenayah telah dilakukan, tanpa menghiraukan sama ada atau tidak remedi sivil boleh diperolehi oleh mangsa (lihat perenggan 5).

(3) Dua laporan polis telah dibuat oleh pemohon tetapi SM Sukumaran hanya mencuba untuk menyelesaikan perkara tersebut 'amicably', tanda yang jelas bahawa tiada siasatan yang diniatkan untuk dijalankan. Atas fakta dua laporan tersebut, diambil bersama dengan afidavit sokongan pemohon, kemungkinan kesalahan jenayah penggelapan harta dikemukakan. SM Sukumaran tidak kompeten untuk memutuskan jika laporan-laporan mengemukakan kesalahan sivil atau jenayah (lihat perenggan 9–10).

(4) Aduan pemohon tidak sepatutnya ditolak secara terus sebagai pertikaian sivil semata-mata yang tidak mewajarkan siasatan. Hanya siasatan yang penuh dan betul boleh mengesahkan jika penahanan kapal pemohon melibatkan apa-apa unsur jenayah atau sebaliknya (lihat perenggan 12).]

Notes

For a case on court direction to police to conduct further investigation, see 5(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2915.

Cases referred to

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180b (refd)

Legislation referred to

Criminal Procedure Code ss 110(1), 120(1), 128(1)(c), 133(1A), (1B), 376(1), 413, 413(1), (2)
Penal Code s 403
Rules of the High Court 1980 O 53 r 2(3)
Specific Relief Act 1950 ss 44(1), (1)(b), (1)(d)

Marcel Jude Joseph (Marcel Jude Joseph (2000) & Co) for the applicant.
Shamsul bin Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Abdul Rahman Sebli J:

THE APPLICATION

[1] This application seeks for an order of mandamus to direct the

respondents to detain, secure and return to the applicant her boat which is being detained at Lot 16, Taman Friendship Garden, Phase 2 Kota Kinabalu by one David Teo since 17 April 2010. It is a 31ft gulfcraft imported yatch costing RM300,000. Having gone through the affidavit evidence and the arguments of both sides carefully, I do not consider this to be a fit and proper case for the grant of the order sought. If the police have reasons to believe that a criminal offence has been committed in respect of the boat the procedure is for the police to refer the matter to the magistrate under s 413 of the Criminal Procedure Code ('the CPC'). Subsections (1) and (2) are relevant and they provide as follows:

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(1) The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of the property to the person entitled to the possession of it, or, if that person cannot be ascertained, respecting the custody and production of the property.

(2) If the person so entitled is known the Magistrate may order the property to be delivered to him on such conditions, if any, as the Magistrate thinks fit, and shall in that case cause a notice to be served on that person informing him of the terms of the order and requiring him to take delivery of the property within such period from the date of the service of the notice (not being less than forty-eight hours) as the Magistrate may in the notice prescribe.

[2] The question however is whether the police have carried out a proper investigation or at all. In her affidavit in support the applicant complains that despite lodging two police reports regarding her boat on 28 July 2010 and 19 May 2011 respectively she has not heard any news from the police. Instead she was given a run around by those whom she thought could help her, including a lawyer.

WHETHER POLICE DUTY BOUND TO INVESTIGATE REPORTS

[3] Under s 110(1) of the CPC it is incumbent on the police to investigate the two police reports lodged by the applicant. This therefore qualifies for the grant of an order of mandamus to order the respondents to carry out investigations if it can be shown they have failed to do so and provided the other conditions under s 44(1) of the Specific Relief Act 1950 ('the Specific Relief Act') are fulfilled. In this regard I am satisfied that the other conditions have been fulfilled.

[4] Proviso (d) to s 44(1) stipulates that for the grant of the relief the applicant must show that she has no other specific and adequate legal remedy. It was argued by the learned senior federal counsel that this condition has not been fulfilled as the applicant can pursue a civil suit against David Teo for the return of her boat. If the argument is to be accepted it would mean that in cases involving theft of property to cite just one example no order of mandamus can ever be granted by the court to compel the police to investigate the theft on the ground that the stolen property can be recovered by way of civil action. I do not think that will be consonant to right and justice.

[5] In my view where the detention of property involves a criminal element the fact that the victim can pursue a civil suit to recover the property does not disentitle him to the remedy under s 44(1) of the Specific Relief Act. It is the duty of the police to act where a crime has been committed, irrespective of whether a civil remedy is available to the victim or otherwise. In *Koon Hoi Chow v Pretam Singh* [1972] 1 MLJ 180b Sharma J in dealing with proviso (b) to s 44(1) of the Specific Relief Act said at p 181:

> Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. There must be under the law some duty cast upon the public officer. If he does not do the duty, then the court will call upon him to perform that duty.

WHETHER CASE CIVIL OR CRIMINAL IN NATURE

[6] In opposing the application the respondents rely solely and entirely on the affidavit in opposition of Sargeant Major R91646 Sukumaran a/l Batumalai ('SM Sukumaran') affirmed on 5 September 2011. It is obvious from his affidavit that no investigation was carried out by the police in respect of the two reports lodged by the applicant. SM Sukumaran claims that the dispute between the applicant and David Teo, the person alleged by the applicant to have wrongfully detained her boat, is purely a private or contractual matter between two private individuals.

[7] There appears to be two reasons why he thinks that this is a civil matter. Firstly David Teo told him that the applicant owed him (David Teo) RM12,000 for towing and keeping the boat in his house compound and the figure was later raised to RM52,000 after David Teo found out about the two police reports lodged by the applicant. The additional RM40,000 was purportedly for 'tarnishing' David Teo's image by reason of the two police reports. The second reason is that a Kota Kinabalu court staff told him that the matter is a civil matter after looking at the two police reports which the applicant showed to the court staff. This took place when he and the applicant were at the registration counter of the magistrates court on 20 May 2011.

[8] As for the reason why he acted as a go-between in the matter, SM Sukumaran's explanation is that after the court staff advised him that it was a civil case, he offered his assistance to the applicant. This is what he said in para 7(2) of his affidavit:

> Noticing that the Applicant was worried and not knowing what to do next, I then offered my assistance to her and asked from her the telephone number of David Teo with intention that I call David Teo to see if the matter could be resolved amicably between the Applicant and David Teo. I then called David Teo over the telephone in front of the Applicant and I arranged for an appointment for David Teo to come to see me at the Balai IPD Kota Kinabalu together with the Applicant in the afternoon at 2.00 p.m. I also asked the Applicant to attend for the meeting at my office.

[9] I must say with due respect that the way the applicant's complaints were handled leaves much to be desired. Two police reports had been lodged, yet SM Sukumaran saw it fit to try to resolve the matter 'amicably', a clear indication that no investigation was intended to be carried out. It is undisputed that the boat belongs to the applicant. It is registered in her name. Therefore she has absolute right over the boat. On the face of the two police reports, considered together with the applicant's affidavit in support (and this includes the statement of facts at exh 'GLK7' which forms part of the affidavit in support), a possible offence of criminal misappropriation of property is disclosed, an offence punishable under s 403 of the Penal Code which provides as follows:

> Whoever dishonestly misappropriates, or converts to his own use, or causes any other person to dispose of, any property, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.

[10] The key word here is 'dishonestly'. According to the applicant David Teo has no right to detain her boat as she does not owe him the RM52,000 that he is asking for. This claim must be investigated by the police as it contradicts David Teo's explanation to SM Sukumaran. With due respect to SM Sukumaran I do not think he is competent to decide if the reports disclose a civil or a criminal offence. In the first place he is not the investigating officer of the case as he himself admits in para 7(4) of his affidavit. It is clear that his role was mainly to arrange for a meeting between the applicant and David Teo to resolve the matter amicably and this too was done by him on a voluntary basis.

[11] Learned senior federal counsel submitted that it would be against public policy to compel interference with police investigation and criminal prosecution in a private dispute. Counsel is right if the case had been investigated and the result clearly and undoubtedly shows that it is a civil dispute between the applicant and the person detaining her property. But

unless and until a proper investigation is carried out, it is premature for the respondents to conclude that the reports do not disclose any criminal offence warranting an investigation. A case that appears to be a civil case at first blush may turn out to be criminal in nature after a full investigation. Even if the facts disclose a civil cause of action it does not necessarily mean, as night follows day that no criminal proceedings can be instituted. A criminal prosecution can go side by side with a civil proceeding. This is not something that is uncommon in our justice system. The question of compelling interference with police investigation and criminal prosecution does not arise as no investigation has been carried out in the first place.

[12] I am of course mindful of the fact that some unscrupulous people may abuse the process by using the police for their own private interest as opposed to the interest of the public at large but having regard to the surrounding circumstances of the case I do not think the applicant's complaints deserve to be summarily dismissed as a mere civil dispute unworthy of any investigation. From the affidavit in support of the applicant, in particular the contents of her statement of facts, there is more to it than meets the eye. Only a full and proper investigation can confirm if the detention of the applicant's boat involves any criminal element or otherwise.

[13] It is important to remember that it is the public prosecutor who decides whether an offence has been committed and if so whether any person is to be prosecuted in connection therewith. The power of the police is to investigate, not to decide whether any person is or is not to be prosecuted for any crime or, for that matter, to decide whether a police report discloses a civil or a criminal matter. That power lies with the attorney general acting in his capacity as public prosecutor as provided in art 145(3) of the Federal Constitution read together with s 376(1) of the CPC. If indeed the applicant had been the victim of a crime, it would be a gross injustice to allow her to be kept out of her property for such a long period of time. No one should be allowed to suffer from the criminal act of another and no one should profit from a crime under whatever pretext.

POLICE TO COMPLETE INVESTIGATION WITHOUT UNNECESSARY DELAY

[14] Section 120(1) of the CPC provides that a police investigation must be completed without unnecessary delay and the result thereon reported to the public prosecutor unless by order in writing the public prosecutor directs that the report need not be forwarded to him. Section 120(1) provides as follows:

> 120(1) Every police investigation under this Chapter shall be completed without unnecessary delay, and as soon as it is complete the officer making the investigation shall unless the offence is of a character which the Public Prosecutor has directed

need not be reported to him forward to the Public Prosecutor a report in the form in the Second Schedule setting forth the names of the parties, the nature of the information, and the names of the persons who appear to be acquainted with the circumstances of the case.

[15] There is nothing in the affidavit of SM Sukumaran to show that the investigation papers have been submitted to the public prosecutor as required by s 120(1) of the CPC. In fact there is nothing in his affidavit to show that the two police reports lodged by the applicant have been investigated at all. All he did was to try to resolve the matter amicably. SM Sukumaran avers that the matter had been 'Referred to Magistrate' but does not say whether an enquiry had in fact been held by the magistrate and if so what was the decision or order given by the magistrate and why the matter was referred to the magistrate instead of to the public prosecutor or his deputy. Was the decision to refer the case to the magistrate the decision of the public prosecutor pursuant to s 128(1)(c) of the CPC or was it the decision of the police? The respondents have not made it clear in the affidavit of SM Sukumaran.

[16] Nor is it clear if the public prosecutor was even aware of the proceeding before the magistrate, if at all there was any. Even where a case had been 'Referred to Magistrate', s 133(1A) of the CPC empowers the public prosecutor at any stage of the examination to direct the police to investigate the offence complained of and to report thereon to him. If an order had been given to that effect by the public prosecutor s 133(1B) prohibits the magistrate from proceeding with the examination of the complainant. It is therefore incorrect for learned senior federal counsel to suggest that since the complaint had been referred to the magistrate the police no longer have any public duty to perform in respect of the two police reports lodged by the complainant.

ROLE OF PUBLIC PROSECUTOR IN POLICE INVESTIGATION

[17] It is a fallacy to think that in criminal proceedings the role of the public prosecutor is confined to criminal prosecution with no say in the investigation. Under the CPC he is empowered to direct police investigation and to carry out further investigation. There is a good reason for this. If no or no proper investigation is carried out by the police upon receipt of a police report, the criminal justice system, of which the public prosecutor's office is an integral part will fail. His role in the investigation is not to usurp the powers of the police but to ensure that the investigation is carried out fairly and properly and without fear or favour because ultimately he is the authority to decide whether any criminal proceeding is to be instituted against any person under investigation and takes responsibility for that decision.

A WHETHER ORDER TO BE CONFINED TO RELIEF SOUGHT

[18] In her application for judicial review, other than the specific relief that she is seeking, the applicant is also asking for 'Any other relief deemed fit by this court'. In this connection O 53 r 2(3) of the Rules of the High Court 1980 provides as follows:

> (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application *or make any orders* including an order of injunction or monetary compensation:
>
> Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.

[19] In the light of the foregoing reasons, although I find that this is not a fit and proper case for this court to order the respondents to seize and return the boat to her, justice demands that her two police reports ought to be fully and properly investigated by the police and the result thereof reported to the public prosecutor for his further action. The court cannot not turn a blind eye on her plight. Accordingly, I order that the respondents do carry out a full and proper investigation into the two reports lodged by the applicant without further delay and to report the result of the investigation to the public prosecutor or the deputy public prosecutor pursuant to s 120(1) of the CPC.

[20] This does not of course stop the applicant from taking whatever civil action she may wish to take against any party having possession of her boat including a claim for loss and damages. That is a matter entirely for her to decide.

Relief sought by applicant disallowed.

Reported by Ashok Kumar